

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,672

JANUARY TERM 1957

JOSEPH A. WAGSTAFF,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

**Appeal from the District Court of the United States
for the District of Columbia**

*United States Court of Appeals
For the*

District of Columbia Circuit

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FILED FEB 11 1957

Printed by Action Printing Co., 615 Fifth Street, N.W., Washington, D. C.

CLERK

QUESTION PRESENTED

Did the Court err in admitting hearsay evidence of confession allegedly made by a co-defendant in the presence of appellant?

Did the Court's statements of guilt prior to the poll of the jury render the verdict a nullity?

INDEX

	<i>Page</i>
Jurisdictional Statement	1
Statement of The Case	1
Argument I	2
Argument II	5

TABLE OF CASES

Belleci vs. U.S., 87 U.S. App. D.C. 274, 184 F. (2) 394 (1950)	6, 7
Boring vs. Beard, 226 Ky. 47, 10 S.W. (2) 447	5
Garst vs. U.S. 180 F. 339, 103 C.C.A. 469	7
Haupt vs. Utah, 110 U.S. 574, 28 L. Ed. 262, 4 S. Ct. 202	2
Kelly vs. U.S. (decided 26 July, 1956)—U.S. App. D.C...	4
Martin vs. State 109 A (2) 325	8
Pinkard vs. U.S.—U.S. App. D.C.—(decided 10 January, 1957)	5
Robinson vs. U.S. 290 F. 755	7
Solar vs. U.S. 80 Wash. L. Reporter 235 (1952)	7
Sparf and Hansen vs. U.S. 156 U.S. 51	4
U.S. vs. Murdock 290 U.S. 289, 54 S. Ct. 223	6

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BRIEF ON BEHALF OF APPELLANT

JURISDICTIONAL STATEMENT

The appellant herein appeals from a final criminal judgment of the United States District Court sentencing him to imprisonment in a federal penitentiary. The jurisdiction of this Court is provided for by the law as found in Title 28, United States Code, section 1291, 1952 Ed.

STATEMENT OF THE CASE

Appellant was originally sentenced on 15 January, 1952. The sentence was modified on 13 October, 1953. Then, on 10 December, 1956, said sentence was "vacated, set-aside and held for naught." A new sentence was imposed. This new sentence was based upon the original verdict and was a slightly more harsh penalty.

The facts of the case concerned a "hold-up" of a local taxicab driver. Appellant and another were indicted as accomplices. A plea of guilty was entered by the other defendant. Appellant went to trial, where the government relied primarily on a detailed confession as it had supposedly been given by the co-defendant upon arrest, and, an identification of appellant by the taxicab driver. The confession was by way of hearsay. It was admitted on the theory that since it had been made in the presence of appellant, who remained silent instead of making a denial, it could be imputed to him.

The co-defendant testified that appellant was not the man who was with him at the time of the crime.

ARGUMENT

I

The law of confession and criminal admission is involved here. No type of criminal evidence is more accurate and deadly than a voluntary admission of guilty conduct. A prosecuting lawyer who goes to trial armed with a confession knows that he is armed with the most persuasive evidence available. All informed sources take this position. Wharton goes further to say it is "conclusive". Criminal Evidence, 10th Ed., vol. 2, page 1439. The Supreme Court spoke similarly on point in *Haupt v. Utah*, 110 U.S. 574, 584, 28 L. Ed. 262, 4 S. Ct. 202, and there collated other authorities; 1 Greenleaf Ev. p. 215; Starkie, Ev. 73; 1 Phil. Ev. 53 and Arch. Cri. Pl. 125.

Over objection in this case, the trial court admitted hearsay testimony of the complaining witness and several police officers concerning a closed interrogation conference held in one of the local police station houses. They all explained that the appellant and another, also accused of the crime, were present *vis-a-vis*. They related that the reputed accomplice made a complete expose as to how he and the appellant had committed the crime. These witnesses re-

counted the inculpatory words of the said accomplice concerning the guilt and participation of the appellant. The evidence was that appellant heard these accusatory statements, but did not deny or attempt to refute them.

However, these witnesses did remember appellant's requests for legal counselling. The prosecuting witness recalled it this way:

Q. Did you hear Wagstaff talk to anybody in that room?

A. No, sir. He did not. He said he wanted to see his attorney.

Q. I asked you if you heard Wagstaff talk to anyone in that room?

A. No, Sir.

Q. Did you hear any police officer talk to him in that room?

A. Asked him if he wanted to make a statement. He said no, he wanted to see his attorney.

(Trans. and Rec. pg. 16.)

Next, the arresting officer answered similar questions as follows:

Q. Did you question the defendant Wagstaff, or was he questioned in your presence?

A. Well, I did not question him. I remember of him having been asked one specific question in my presence.

Q. What was that question?

(An objection was here overruled.)

A. Whether or not he would make a statement, or whether or not he cared to make a statement.

Q. And what was the answer of the defendant Wagstaff, if any?

A. His answer was that he did not want to make a statement until after he had talked with his lawyer.

(Trans. and Rec. pg. 38.)

Finally, another police officer who was present at the inquisition stated:

Q. Officer, did the defendant, Wagstaff, in response to questioning at No. 6 Precinct, make any statement

relative to the robbery of the cab driver known to you as Murray?

A. The only thing that he would state was "I want to see a lawyer."

Q. What was that?

A. The only thing he stated that I heard was "I want to see a lawyer."

(Trans. and Rec. pg. 73.)

With the record in such a situation as this the lower court clearly erred in allowing the lethal evidence of confession to reach the jury through an improperly applied exception to the hearsay rule.

The hearsay exception of admission or confession by silence is dangerous at best. It is difficult to explain to a jury and easy to misunderstand. As is evident, the truth determining value of such a constructive confession depends upon the circumstance at the time of the penalized silence. The circumstances must be such "as would warrant the inference that he would naturally have contradicted it if he did not assent to its truth." *Sparf and Hansen v. U.S.*, 156 U.S. 51, 56.

For these and other reasons many restrictions and exceptions have been imposed on its use. For example many courts have taken the position that as a matter of law, it will not be applied to silence of a prisoner while under arrest. There is uncertainty in this jurisdiction as to whether that fact of arrest is alone sufficient to negate any such inference (of confession) predicated upon the silence of the accused.

However there is no uncertainty in a case such as the instant one where the party insists on his constitutional right to talk things over with his lawyer first. The request for immediate legal counselling clearly contradicts any fiction of a voluntary attitude of guilt. The local case on point is the one of *Kelly v. U.S.*, ____ U.S. App. D.C. ____, decided 26 July, 1956, and more recently followed in *Pinkard*

v. *U.S.*, ____ U.S. App. D.C. ____, decided 10 January, 1957.
It explained:

"But we need not select the rule we would apply had the accused simply remained silent, for he spoke, and gave as his reason for refusing to make a statement his desire first to consult his lawyer. In this situation, the factors mentioned in the above quotations are reinforced by an explicit rebuttal of any inference that the accused was admitting the truth of the accusations, and the rule stated by Chief Judge Laws in *United States v. Kelly*, 119 F. Supp. 217, 221-2, applies:

"But whatever may be the correct rule with regard to silence on the part of a defendant upon reading a statement attributing crime to him, the facts of this case present a different problem. Defendant Kelly was not silent. His statements 'I'll tell my story to my lawyer' and 'I have nothing to say at this time' appear to be the assertion of his legal right to refuse to talk. During an examination by the police while under arrest a defendant, usually conscious and often cautioned that anything he says may be used against him, well may be restrained from participating in a discussion of the case with police officers by a belief his interests will better be served at the time by exercising his right to remain silent. It is not reasonable to interpret an assertion of right as constituting an admission of guilt. Kelly's refusal to comment on Washington's confession may therefore not be construed as an admission of guilt, and is not admissible in evidence against him."

ARGUMENT

II

"The most substantial right of the accused in a felony case, incident to his constitutional privilege of being present when the verdict is returned, is the right to poll the jury and to require each member of the jury when to face to face with the accused to state whether or not the verdict is his verdict, . . ." *Boring v. Beard*, 226 Ky. 47, 10 S.W. (2) 447, 451.

Here is how that most substantial right was denied the appellant in the trial below, as it was transcribed by the official court reporter:

VERDICT OF THE JURY

THE DEPUTY CLERK OF THE COURT: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN OF THE JURY: We have.

THE DEPUTY CLERK: What say you as to the defendant Joseph A. Wagstaff on Count 1 of the indictment?

THE FOREMAN: We, the jury, find the defendant Joseph A. Wagstaff guilty on both counts as charged.

THE DEPUTY CLERK: What say you on count 2 of the indictment?

THE FOREMAN: Guilty.

THE DEPUTY CLERK: Members of the Jury: Your foreman says that your verdict in this case is a finding of guilty as charged on each count; and that is your verdict, so say you each and all.

EACH JUROR: It is.

THE COURT: I think your verdict is an entirely proper one. I am confident that if I were a member of the jury, I would have concurred in your finding, if I had participated in your deliberations.

MR. AHEARN: I ask that the jury be polled.

THE COURT: Poll the jury.

(Thereupon the jury was polled.) (Trans. p. 129.)

Appellant believes that the court's interdiction of his opinion of defendant's guilt before the case was over is an error of serious import.

"... Although the power of the judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases." *U.S. v. Murdock*, 290 U.S. 289, 391, 54 S. Ct. 223 (1933).

For a later and more informatively written opinion see *Belleci v. U.S.*, 87 U.S. App. D.C. 274, 282 (1950). Such a drastic thing can be done only on proviso that the jury is given unequivocally to understand that it is not bound by

his opinion as to the facts, but that it is the exclusive judge thereof. *Robinson v. U.S.*, 290 F. 755, cert. den. 263 U.S. 700, and *U.S. v. Belleci*, (supra) page 283. Furthermore any such personal opinion may be made only at the usual time of instruction prior to deliberation. *Garst v. U.S.*, 180 F. 339, 103 C.C.A. 469.

"When the appellant requested to have the jury polled, which was his right, he thereby agreed to be bound by the result of the poll rather than by the verdict as stated by the foreman. It is well established that the result of polling a jury is to eliminate the previously proffered verdict and substitute therefore the individual verdict of each juror." *Solar v. U.S.*, 80 Wash. L. Rep. 235, 86A (2) 538 (1952).

If a defendant is not treated with fairness at any stage of a criminal trial, then the proceeding is not strong enough to support a judicially coerced deprivation of his liberty. Reversible error may occur at any time from the impaneling of the jury to the taking of their verdict. The eleventh hour of justice is as important as the first.

It is true that a poll of the individual jurors seldom alters the foreman's announcement of the jury's unanimous conclusions. It is probably for this reason that a defense lawyer usually feels that a request for a poll is met by the court and attached personnel with a silent weight of disgust or attitudes of impetuosity; so much time consumed in exchange for so slight a chance of correcting a potential injustice.

If this right to inquire were insubstantial it would have withered from our *corpus juris* long ago. It certainly would not have been codified and enunciated so emphatically in our modern rules of court. Rule 31 (d) of the Federal Rules of Criminal Procedure says:

"When a verdict is returned and before it is recorded the jury shall be polled at the request of any party . . ."

The words are commandatory. A verdict cannot be recorded until a requested poll is taken.

In looking at the facts of this case can anyone fairly say that an effective poll could have been taken after the judge interdicted his forceful statements of guilt? Of course, an ineffective poll is the same as no poll. In reality, these unnecessary but noxious remarks from the bench rendered any subsequent poll meaningless. Each juror's function of deciding the fact of guilt for himself was usurped by the Court.

"Yet, it is better that the case be tried again than that a precedent impairing a defendant's right to poll of the jury be engrafted on our criminal procedure."
Martin v. State, 109 A (2) 325, 327.

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